PATERSON CANDY (MALAYSIA) SDN. BHD.

v.

ONG BUN LEE @ ONG KIM BEE

HIGH COURT SABAH & SARAWAK, KUCHING
DATO' HJ. ABDUL KADIR BIN SULAIMAN J
[SUIT NO. KG. 310 OF 1981]
27 APRIL 1995

BANKRUPTCY: *Proof of debt - Proof lodged with the Official Assignee - Proof withdrawn - Effect of withdrawal - Receiving order and adjudication order rescinded and annulled - Whether annulment of the order frees the defendant from all debts - Whether the plaintiff is prevented from claiming thereafter.*

PRACTICE & PROCEDURE: *Close of pleadings - O. 18 r. 2(2) RHC 1980 - Summons under O. 14 RHC served by plaintiff before defendant's defence - Reply made to defendant's counterclaim - Whether pleadings deemed closed after reply served.*

PRACTICE & PROCEDURE: *Summons for direction - Application for summary judgment on defendant's counterclaim pending before Court - Summons for direction taken out before disposal of summary judgment - Whether summons for directions premature.*

PRACTICE & PROCEDURE: *Order 18 r. 19(1), (b) & (d) RHC 1980 - Application to strike out plaintiff's statement of claim - Whether withdrawal of proof of debt by plaintiff against defendant extinguished plaintiff's claim - Whether the continuation of the plaintiff's action frivalous and vexatious - Whether an abuse of the process of the Court.*

The plaintiff had on 30 July 1981 filed an action against the defendant for a debt owed by the defendant and had subsequently filed an application for summary judgment. The defendant then filed his defence and counterclaim and had also filed an application for summary judgment on his counterclaim and this was followed by the plaintiff's reply and defence to the counterclaim. The two applications came up for hearing and was adjourned to a date to be fixed. Meanwhile, on 30 April 1984, adjudication and receiving orders were made against the defendant at the instance of the petitioning creditor and the plaintiff lodged a proof of the defendant's debt to him with the Official Assignee. It later withdrew its proof of debt. However, between the petitioning creditor and the defendant, a proposal for a composition was confirmed and the receiving and adjudication order was subsequently rescinded and annulled.

The plaintiff's and the defendant's application for summary judgment came up for mention before the Court on 25 September 1992, ten years after the last adjournment. The plaintiff withdrew its application for summary judgment but indicated to the Court that it would file notice of intention to proceed with the suit against the defendant. No order was made with regard to the defendant's application. On 27 October 1992, the plaintiff filed a notice of intention to proceed in the matter or cause and on 25 November 1992 took out a summons for directions. The defendant then filed an application to have the said summons dismissed and the plaintiff's statement of claim struck out, but the application was dismissed by the learned Senior Assistant Registrar. The defendant appealed against the dismissal on the ground that there was inordinate delay in filing the said summons for direction. He contended that there was failure to take it up within one month from the date the pleading in the action was deemed to be closed, which according to the defendant was around end of May or early July 1982. It was further contended that there was no justification for the suit to proceed

to trial because the annulment of the adjudication order had the effect of setting the defendant free from all debts and laibilities except that which was due to the Government.

Held:

[1] The matter before the Official Assignee was in respect of the proof of debt lodged by the petitioning creditor alone. The plaintiff was not involved in the Court granting the application of the defendant for the rescission and the annulment of the orders made against him. The withdrawal of the proof of debt lodged before the debt was so proved and accepted by the Official Assignee would not extinguish the claim of the plaintiff. Furthermore, the order made upon the defendant was not one of discharge under s. 33 of the Bankruptcy Act 1967 but one of rescission of the receiving order and the annulment of the adjudication order pursuant to s. 105 of the Act. Under s. 105(4) of the Act, any disputed debt shall be considered as paid in full only if the debtor (defendant) enters into a bond to pay the amount to be recovered in any proceeding for the recovery of or concerning the debt with costs. In this case there was no such bond executed by the defendant.

[2] The issue of the close of proceedings should be determined in the light of O. 18 r. 2 RHC. By the operation of O. 18 r. 2(2) the defendant is not obliged to serve his defence on the plaintiff unless by the order made on the summons of the plaintiff, he is given leave to defend the action. In this case, until 26 September 1992 the plaintiff's summons under O. 14 had not been disposed off by the Court and the Court on that day did not make any order giving the defendant leave to defend the action. The period for determining the close of the pleadings has not actually begun to run.

[3] The summons for direction was taken up soon after the service of the notice of intention to proceed with the action for before that the issue of the taking up of summons for direction would not arise because the plaintiff's application for summary judgment was still pending in Court. However, there is still pending before the Court the defendant's application for summary judgment on his counterclaim. Unless and until this application of the defendant is disposed off, the question of taking out a summons for direction with a view for the trial of the action would not arise yet.

[4] In light of what was said ealier in regard to the effect on the withdrawal of the proof of debt lodged with the Official Assignee, the application made O. 18 r. 19(1), (b) and (d) cannot suceed. The withdrawal of the proof of debt lodged before the debt was so proved and accepted by the Official Assignee would not extinguished the claim of the plaintiff by this action.

[Application dismissed with costs; summons for direction stayed pending disposal of the defendant's application under O. 14 RHC].

Legislation referred to:

Bankruptcy Act 1967 ss. 33, 35, 105(4), Sch. C

Rules of the High Court 1980, O. 3 r. 6, O. 14, O. 18 rr. 2, (2), 19 (1)(b), (d), 20, O. 25, rr. 1(1), (4), O. 56 r. 1.

For the appellant - Ernest Chua; M/s. Ernest Chua & Co.

For the respondent - Stanley Eddy; M/s. Battenberg & Talma

JUDGMENT

Hj. Abdul Kadir bin Sulaiman J:

The plaintiff filed the action against the defendant on 30 July 1981 claiming a sum of RM178,718.05 for the balance owing by the defendant for the supply of water treatment plants for five projects and other unpaid related expenses incurred by the plaintiff for these projects in respect of the defendant's contract with the state JKR. On 2 March 1982, i.e., before any defence filed by the defendant, the plaintiff filed an application under O. 14 of the Rules of the High Court 1980 ("the RHC") for summary judgment against the defendant. According to the learned Counsel for the plaintiff, its application under O. 14 was served on the defendant on 4 March 1982. By this date the defendant had not yet filed any defence to the claim of the plaintiff. Only on 5 April 1982 the defendant filed his defence and counterclaimed against the plaintiff for a sum of RM79,717.25. On 20 April 1982, i.e., before the plaintiff filed any reply or defence to the counterclaim of the defendant, the latter similarly filed an application under O. 14 of the RHC for summary judgment on his counterclaim. Only on or about 14 May 1982, the plaintiff filed its reply and defence to the counterclaim of the defendant.

On 26 April 1982 the two applications for summary judgment respectively of the plaintiff and the defendant first came up for hearing but finally on 19 October 1982 they were adjourned to a date to be fixed.

Meanwhile, on 30 April 1984 adjudication and receiving orders were made against the defendant, as the sole proprietor of the Sarawak Water Supply Engineering and Trading Company in Bankruptcy Proceedings No. KG. 125 of 1983 at the instance of a petitioning creditor, the Hongkong and Shanghai Banking Corporation. The plaintiff lodged a proof of the defendant's debt to him, with the Official Assignee. The first meeting of creditors was fixed for 29 November 1989. However, according to the minutes of the meeting exhibited as "OBB 3A" to the affidavit of the defendant in support of this present application affirmed by the defendant on 12 January 1993, before proceeding, the plaintiff withdrew his proof of debt leaving only the petitioning creditor to prove its debts for the purpose of considering whether a proposal for a composition should be entertained. At this meeting the petitioning creditor accepted the proposal put up by the defendant/bankrupt and the meeting was adjourned to 12 December 1989 and the proposal for a composition between the petitioning creditor and the defendant/bankrupt was confirmed at the meeting on that date. The plaintiff was not at all involved as it had earlier on withdrawn its proof of debts. By a Court order dated 9 April 1990 the Court approved the composition between the petitioning creditor and the defendant. Subsequently on the application of the defendant, the receiving order and the adjudication order made against him on 30 April 1984 was respectively rescinded and annulled by the Court.

As regards the applications for summary judgment of the plaintiff and the defendant, the matters came up for mention before the Court on 25 September 1992, i.e., after a lapse of almost ten years since the last adjournment of 19 October 1982. On that day the plaintiff informed the Court that it would not proceed with its earlier application for summary judgment and applied that the application be struck out. However, the plaintiff indicated to the Court that it would file the notice of intention to proceed with the suit against the defendant. The Court granted the said application of the plaintiff and struck out its application for summary judgment. However no order or no mention at all was made in regard to the pending application of the defendant for summary judgment on his counterclaim. On 27 October 1992 the plaintiff filed a notice of intention to proceed in the cause or matter after the expiration

of one month from the date thereof by filing summons for directions and setting down the action for trial, pursuant to O. 3 r. 6 of the RHC. On 25 November 1992 the plaintiff took out a summons for directions pursuant to the said notice and it was scheduled for hearing on 16 January 1993.

However, before the hearing of the summons for directions, on 12 January 1993, the defendant filed this present application to have the said summons for directions of the plaintiff dismissed and the plaintiff's statement of claim in the suit be struck out. The learned Senior Assistant Registrar ("the SAR") dismissed this application of the defendant. Hence this appeal to me pursuant to O. 56 r. 1 of the RHC against the said decision of the learned SAR. This appeal is by way of a rehearing.

The ground to support the application that the plaintiff's summons for directions be dismissed, is that the plaintiff has failed to comply with O. 25 r. 1(1) of the RHC and that there was inordinate delay in filing in the said summons, in the sense that it was not so taken up by the plaintiff within one month after the pleadings in the action are deemed to be closed. In this case, if the defendant is right, the pleadings were deemed to be closed around the end of May or early June 1982 as the reply was filed by the plaintiff on or about 14 May 1982. But the said summons was only taken out by the plaintiff on 25 November 1992, after a lapse of over 10 years. Perusing the RHC, I find that this nature of application by the defendant is strange. I say so because O. 25 provides an express sanction in the case where a plaintiff failed to take out a summons for directions within one month after the pleadings are deemed to be closed. The sanction is in O. 25 r. (1)(4) in that the defendant can either do so instead or he can apply for an order to dismiss the action of the plaintiff for want of prosecution. But in this case, the defendant did not do any one of these before the plaintiff took out the said summons after having given notice to the defendant of its intention to proceed with the action.

In his submission before me in support of this application to have the summons for directions of the plaintiff dismissed, the learned Counsel for the defendant contends that there is no justification for this suit to proceed to trial after the plaintiff had proved his debt before the Official Assignee and had subsequently withdrawn his proof of debt resulting in the Official Assignee making a report to the Court to support the defendant's application for an order to rescind and annul the receiving order and the adjudication order respectively. I see no basis on this line of argument because after the making of the receiving order upon the defendant, what the plaintiff did was to lodge a proof of debt. The debt is not due to the plaintiff upon the lodgment of the proof of debt. It is merely a debt provable in bankruptcy. The mode of proving debts is contained in Schedule C to the Bankruptcy Act 1967. Until formally admitted by the Official Assignee, the debt is not proved. In this case, according to Exhibit "OBB 3A" at the first general meeting held on 29 November 1989, the plaintiff withdrew his proof of debt and was accepted by the Official Assignee. So the matter before the Official Assignee on that day was in respect of the proof of debt lodged by the petitioning creditor alone. Exhibit "OBB 7" to the affidavit in support of the defendant in this present application, is the Official Assignee's report to the Court in support of the defendant's application for the rescission and annulment of the receiving and adjudication orders made upon him. Paragraph 10 of the said exhibit clearly indicates that there was only one claim against the estate of the bankrupt by the petitioning creditor for the sum of RM22,793.47. The other claims, which includes that of the defendant had been withdrawn. So, the plaintiff was not involved in the Court granting the application of the defendant for the rescission and annulment of the orders made against him.

The learned Counsel further submits that the effect of the annulment of the adjudication order sets the defendant free from all debts and liabilities except that which is due to the Government. He quoted s. 35 of the Bankruptcy Act 1967 as the authority. Here again he missed the point. In the case of the defendant, the order made upon him was not one of discharge under s. 33 of the Act but one of rescission of the receiving order and the annulment of the adjudication order pursuant to s. 105 of the Act. Under s. 105(4) of the Act, any disputed debt shall be considered as paid in full only if the debtor, in this case the defendant, enters into a bond to pay the amount to be recovered in any proceeding for the recovery of or concerning the debt with costs. In this case there was no such bond ever executed by the defendant.

Further submission put forward by the learned Counsel for the defendant is that the plaintiff had delayed itself in taking out the summons for directions for the pleadings had long closed. But in the light of what I said earlier, the argument is not sustainable because the summons for directions was taken up soon after the service of the notice of intention to proceed with the action for, before that the issue of the taking up of summons for direction would not arise because the plaintiff's application for summary judgment was still pending in Court.

On the issue of the close of the pleadings in this action, ordinarily it is governed by O. 18 r. 20 of the RHC. However in respect of this action by the plaintiff and on the events that happened, it should be determined in the light of O. 18 r. 2 of the RHC. The specially endorsed writ of the plaintiff was issued on 30 July 1981. The defendant entered his appearance on 16 December 1981. However, before the defendant filed his defence and counterclaim on 5 April 1982, the plaintiff on 11 February 1982 filed a summons under O. 14 for summary judgment. This summons was served on the defendant on 4 March 1982, again before the filing of the defence and counterclaim by the defendant. By the operation of O. 18 r. 2(2) the defendant is not obliged to serve his defence on the plaintiff unless by the order made on the summons of the plaintiff, he is given leave to defend the action. In this case, until 26 September 1992 the plaintiff's summons under O. 14 had not been disposed off by the Court and the Court on that day did not make any order giving the defendant leave to defend the action. Understandably, this was so because by then the defence and counterclaim had been filed by the defendant. It being done on 5 April 1982 and the summons by the defendant under O. 14 on his counterclaim was then pending before the Court which up to this day has not been disposed off. In the circumstances, the period for determining the close of the pleadings has not actually begun to run. I will mention later on the consequence of the plaintiff's summons for directions in the light of the pending application of the defendant under O. 14 on his counterclaim. But on the application of the defendant to have the said summons of the plaintiff dismissed, for the reasons given above, it lacks merit and I accordingly dismiss the application under this head.

I will now move to deal with the application of the defendant to have the statement of claim of the plaintiff struck out. This application is made pursuant to O. 18 r. 19(1)(b) and (d) of the RHC. It is alleged that the said statement of claim of the plaintiff is scandalous, frivolous and vexatious or is otherwise an abuse of the process of the Court. In his submissions, the learned Counsel contends that these two grounds are interrelated to O. 25 r. 1(4) of the RHC. This line of submission is very hard to follow because his application is not one for an order to dismiss the action of the plaintiff for want of prosecution but for the statement of claim being scandalous, frivolous and vexatious or is otherwise an abuse of the process of the Court. In his submissions, the learned Counsel says that it falls under O. 18 r. 19(1)(b) and (d) of the RHC because the plaintiff's claim is only pegged to one pole and that pole was shifted to the Official Assignee by its lodgment of the proof of debt with the Official

Assignee. Learned Counsel says further that by withdrawing the proof of debt the defendant had lifted the pole and therefore, the debt had been satisfied and so there was no more claim left by the plaintiff against the defendant. As such by holding on to this suit the claim in the suit is scandalous, frivolous and vexatious. If the plaintiff is allowed to proceed with the summons for directions it would amount to an abuse of the process of the Court. If that be the case, in the light of what I said earlier in regard to the effect of the withdrawal of the proof of debt lodged with the Official Assignee, this application under O. 18 r. 19(1)(b) and (d) cannot succeed. The withdrawal of the proof of debt lodged before the debt was so proved and accepted by the Official Assignee would not extinguish the claim of the plaintiff by this action. In the circumstances, the application is dismissed.

Now, I come to deal with the status of the summons for directions of the plaintiff taken out on 25 November 1992. The purpose for such a summons is to prepare the parties for the trial of the action. However, in this case as mentioned earlier, there is pending before the Court an application by the defendant under O. 14 for summary judgment on his counterclaim. Unless and until this application of the defendant is disposed off, the question of taking out a summons for direction with a view for the trial of the action would not arise as yet. In his application which is in Encl. 16, the defendant is praying for final judgment to be entered against the plaintiff for the sum claimed in the counterclaim with interest and costs on the ground that the plaintiff is justly and truly indebted to the defendant for the amount claimed, and that there is no defence to the claim. If the defendant succeeds in his application, there would not be any defence to the counterclaim. In the circumstances, I would order a stay of the plaintiff's summons for directions pending the disposal of the defendant's application under O. 14 and would order that the said application of the defendant be disposed off by fixing an early date for the hearing by the SAR.

In conclusion, I order that this application of the defendant filed on 12 January 1993 be dismissed with costs to the plaintiff to be taxed unless agreed. The plaintiff's summons for direction taken out on 25 November 1992 is hereby stayed pending the disposal of the defendant's application under O. 14 of the RHC and that an early date for the hearing of the said application be fixed.